Editor's note: 92 I.D. 564; Appealed -- aff'd, Civ.No. A86-041 (D.Alaska Mar. 18, 1988), dismissed for lack of prosecution, No. 88-3844 (9th Cir. Dec. 13 1988)

DAVID CAVANAGH AND GARY McCARTHY

IBLA 82-1188 Decided November 8, 1985

Appeal from decision of the Alaska State Office, Bureau of Land Management, declaring unpatented mining claims null and void ab initio and rejecting location notices filed for recordation. AA-42014, AA-42076.

Affirmed in part as modified; reversed in part and remanded.

1. Alaska: Statehood Act--Mining Claims: Lands Subject to--Segregation--State Selections

   Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

2. Mining Claims: Lands Subject to--Segregation--State Selections

   Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

3. Mining Claims: Lands Subject to--Segregation--State Selections

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plat, regardless of what other records may have indicated regarding the validity of the applications. The ordinary citizen contemplating a proposed use or appropriation of the public lands would quite reasonably look to lands other than those within T. 10 N., R. 2 E., Seward Meridian, upon discerning from the master title plat for this township that it was included in State selection applications. Further, there is nothing on the face of the master title plat that would suggest the State selection entries were invalid.

4. Mining Claims: Lands Subject to--Segregation--State Selections

Although the Board may undertake an in pari materia consideration of various land status records (e.g., the master title plat, historical index, and other use plats) as a further method of determining whether public lands were appropriated at a particular time, this is generally done only where a conflict appears between the master title plat and such other records. Here, an in pari materia consideration of other public land records in conjunction with the master title plat fails to establish that Chugach National Forest lands (on which appellants' mining claims were located) were excluded from any of the three State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

5. Mining Claims: Lands Subject to--Withdrawals and Reservations: Generally

Under regulations in effect before 1976, a withdrawal application segregated all lands affected thereby upon the recording of the application on the master title plat and such segregation remained effective until the application was adjudicated and a notice of determination published in the Federal Register. Withdrawal applications filed after enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982), are governed by distinct statutory and regulatory provisions. Thus, under sec. 204 of the Act (43 U.S.C. § 1714) Congress has required that the segregative effect of a withdrawal application terminates upon the expiration of 2 years from the date

of the Federal Register notice regarding the filing of the withdrawal application. In view of this clear statutory mandate, it was error for the Bureau of Land Management to extend application of the "notation rule" to Forest Service withdrawal application AA-23139, filed after enactment of Federal Land Policy and Management Act of 1976, as grounds for rejecting appellants' mining claim locations.

6. Mining Claims: Lands Subject to--Regional Corporation Selections

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of section 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

APPEARANCES: R. Eldridge Hicks, Esq., Anchorage, Alaska, for appellants; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Background

This appeal is taken from a June 30, 1982, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring unpatented placer mining claims of David Cavanagh and Gary McCarthy null and void ab initio and rejecting location notices filed for recordation.

Location notices for the 63 placer mining claims here at issue were filed on March 9, 1981, by David Cavanagh and Gary McCarthy with the Alaska

State Office, BLM, pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982). BLM's decision recites that these claims were located on February 1, 1981, within an area encompassed by protracted secs. 2, 3, 4, 11, 12, and 13, partially surveyed T. 10 N., R. 2 E., and protracted sec. 7, unsurveyed T. 10 N., R. 3 E., Seward Merdian, Alaska, and that these lands lie partially within the Chugach National Forest. BLM rejected all filings and declared the claims null and void ab initio as follows:

> The lands in T. 10 N., R. 2 E., encompassed by McCarthy/Cavanagh's placer mining claims have been segregated from the operation of the Federal mining laws since October 21, 1964, and June 16, 1972, when the State of Alaska filed amended applications A-053727 and A-063695, respectively. A mining claim located since that date was invalid from its inception. Therefore, McCarthy/Cavanagh's mining claims in T. 10 N., R. 2 E., Seward Meridian are declared null and void ab initio, and the FLPMA recordation filings are rejected. [1/]
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> On December 16, 1975, Cook Inlet Region, Incorporated (CIRI) filed selection application AA-8098-36 which encompassed all available lands within T. 10 N., R. 3 E., Seward Meridian. The application was filed under the authority of the Alaska Native Claims Settlement Act (ANCSA) of December 18, 1971 (85 Stat. 688). This selection included lands subsequently staked as placer mining claims by McCarthy/Cavanagh.

1/ BLM's decision refers to three separate state selection applications described as follows:

Serial Number	Land Description
A-053727	Entire T. 10 N., R. 2 E., Seward Meridian
A-058731	Entire T. 10 N., R. 2 E., Seward Meridian (Mineral Estate)
A-063695	Entire T. 10 N., R. 2 E., Seward Meridian

On February 13, 1981, CIRI relinquished its selection application. However, pursuant to the "Notation Rule," described below, the land was not available for entry until April 22, 1982, when the CIRI regional selection application notation was removed from the master title plat.

> Under the Notation Rule [a] claim located at a time when the master title plat in the local Bureau of Land Management Office shows that the lands embraced by the claim are included in a . . . selection application is properly declared null and void ab initio because notation of the . . . application on the official records segregated the land from further appropriation. The rule applies even where the notation was posted in error, or where the segregative use as noted is void, voidable or has terminated. John C. and Martha W. Thomas, d.b.a. Tungsten Mining Company (On Reconsideration), 59 IBLA 364 (1981).

The CIRI relinquishment was noted to the official BLM master title plat on April 22, 1982, at which time the segregative effect of the notation concerning CIRI regional selection application AA-8098-36 ceased to exist.

Because McCarthy/Cavanagh's claims were located on February 1, 1981, when the land was not open to mineral entry under the Federal mining laws, the placer mining claims within T. 10 N., R. 3 E., Seward Meridian are declared null and void ab initio, and the FLPMA recordation filings are rejected.

It should be noted that the Chugach National Forest lands in T. 10 N., Rs. 2 E. and 3 E., Seward Meridian were closed to mineral entry by withdrawal application AA-23139, which was filed with BLM by the U.S. Forest Service under Sec. 204(b) of FLPMA and became effective on December 5, 1978, when it was published in the Federal Register. Notation of the withdrawal application remained on the master title plats at the time of the mining claim locations.

Decision of June 30, 1982 at 2-3.

State selection applications A-053727, A-058731, and A-063675 and Forest Service (FS) withdrawal application AA-23139 at issue here were recently before the Board in B. J. Toohey, 88 IBLA 66, 92 I.D. 317 (1985). In Toohey, BLM rejected placer mining claims filed for lands embraced in

the foregoing selections and FS withdrawal due to the segregation effected by the filing of the applications and in light of operation of the notation rule. 2/ Cavanagh presents essentially the same factual matters and issues of law as Toohey; the parties are represented by the same counsel and the briefs are largely identical. Under the circumstances, substantial portions of this opinion are taken verbatim from the Toohey opinion.

State Selections

[1] The first issue is whether the State selection applications independently bar appellants' claims. Two Departmental regulations are pertinent to this inquiry, each of which attributes a segregative effect to the filing of a State selection application.

At 43 CFR 2091.6-4, it is provided:

> Lands desired by the State under the regulations Subpart 2600 will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the proper office properly describing the lands as provided in § 2627.3(c). Such segregation will automatically terminate unless the State publishes first notice as provided by § 2627.4(c) within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

With respect to State selections in Alaska, 43 CFR 2627.4(b) provides:

> (b) Segregative effect of applications. Lands desired by the State under the regulations of this part will be segregated

2/ An additional State selection application (A-067451) and one additional Forest Service withdrawal application (AA-6060) were involved in Toohey. CIRI application AA-8098-36 was not before the Board in Toohey.

> from all appropriations based upon application or settlement and location, including locations under the mining laws, when the state files its application for selection in the proper office properly describing the lands as provided in § 2627.3(c)(1)(iii), (iv), and (v). Such segregation will automatically terminate unless the State publishes first notice as provided by paragraph (c) of this section within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

While the above regulations, in effect since 1971, clearly attribute a segregative effect to the filing of State selection applications, appellants submit that the regulations contain important qualifications that the selections at issue fail to meet. Thus, it is noted that section 2627.4(b) allows for segregation only of lands "desired" by the State and that the State could not possibly have desired lands within the Chugach National Forest through the filing of a selection application under section 6(b) of the Statehood Act when that section does not allow for selections within national forests. 3/ BLM's decision acknowledges that the three State selection applications were filed under section 6(b) of the Statehood Act. According to BLM, this does not mean that the State did not desire to claim lands within the Chugach National Forest.

The State of Alaska has not appeared in this case. As noted by the Board in Toohey, the State's alleged desire for Chugach National Forest lands, as propounded by BLM on appeal, is belied by its failure to appeal

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3/ Section 6(b) states in part:

"The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: * * *."

BLM's June 17, 1980, decision rejecting in part State selection application A-067451 (see footnote 2), not to mention its nonparticipation in this proceeding. BLM's 1980 decision partially rejecting the State selection states in pertinent part:

> On March 10, 1966, the State of Alaska filed general purposes grant selection applications A-067449, A-067450, and A-067451, for lands in Tps. 12 and 13 N., R. 3 E. and T. 11 N., Rs. 2 and 3 E., Seward Meridian, under the provisions of Sec. 6(b) of the Statehood Act. These lands are located in the Chugach Mountains and the State's selections were valid at the time of filing.
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> The original application for A-067451 was for all lands outside the Chugach National Forest, however, subsequent amendments were filed which included all the lands within T. 11 N.,
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> * * * * *
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> The lands described which are within the Chugach National Forest, approximately 18,280 acres in T. 11 N., R. 2 E., Seward Meridian and 21,120 acres in T. 11 N., R. 3 E., Seward Meridian * * * were not, at the time of selection, nor are they now, vacant, unappropriated, or unreserved (43 CFR 2627.3(a)) and therefore are not proper for selection and are hereby rejected.

In John C. and Martha W. Thomas (On Reconsideration), supra, quoted in part in the BLM decision on appeal, the Board agreed that the provisions of 43 CFR 2091.6-4 and 2627.4(b) attribute a segregative effect to the filing of a State selection application. We stated, however:

> The only limitation is that the selection must be "regular on its face." State of New Mexico, 46 L.D. 217, 22 (1917), overruled on other grounds, 48 L.D. 97 (1921). There is no evidence in the present case that State selection application F-43788 was not regular on its face when filed. [Footnote omitted.]

59 IBLA 364, 367.

Neither BLM nor the Board found the State selection application to be irregular in Thomas. This cannot be said here. As we held in Toohey, a plain reading of the Statehood Act and the Department's implementing regulations conveys that national forest lands are not to be selected under authority of section 6(b) of the Act. 88 IBLA 66, 76-77, 91 I.D. 323-24. BLM has so interpreted the law in prior adjudications of State selection applications. 4/

[2] However, it has been held that after a State selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection was void or voidable. Thomas, supra, at 366. This is the so-called "notation" or "tract book" rule, which the Board upheld in Toohey against appellants' claims that the rule is arbitrary, capricious and violative of due process. The Board characterized the notation rule as an equal protection doctrine, grounded in fairness to the public at large. 88 IBLA at 78, 92 I.D. at 324. Nevertheless, the Board recognized that BLM's invocation of the rule was subject to scrutiny on a case-by-case basis to determine if it was properly applied.

4/ In addition to the rejection of A-067451 already noted, BLM rejected State selection A-053727 at issue in this case, to the extent Chugach National Forest lands were described therein. BLM decision of August 2, 1966, discussed in Toohey at footnote 8. By subsequent decision dated July 27, 1972, BLM partially modified the earlier decision, stating in part:

"When Tract A, T. 10 N., R. 2 E., Seward Meridian, and U.S. Survey 4805, are patented to the State, title to all of the public land in this township will have passed from Federal jurisdiction with the exception of the lands in the Chugach National Forest which were rejected from the selection by the decision of August 2, 1966."
(Exhibit 2 to the SOR).

Here, the notation rule was invoked under three kinds of appropriations--State selection applications, a Forest Service withdrawal application, and a Native Regional Corporation selection. We now consider whether BLM erred in applying the notation rule in these specific respects.

The three State selection applications were recorded on the MTP for the entirety of T. 10 N., R. 2 E., Seward Meridian, at the time appellants' mining claims were located in 1981. State selection application A-053727 was a closed file by this date, having been adjudicated in July 1972 and the record transmitted to the General Services Administration Federal Records Center 2 years later (Serial Register, A-053727, at 3). The other two State selection files remain open records.

Appellants contend that BLM has placed undue reliance on whatever the MTP shows. Citing Kenneth D. Makepeace, 6 IBLA 58, 79 I.D. 391 (1972), appellants argue that BLM's various records must be construed in pari materia, and that BLM cannot pick and choose from among its records to reach a conclusion not supported by the official record as a whole (Reply Brief at 12-14).

[3] While it is true that the Board's decision in Makepeace allows for construing various BLM lands records in pari materia, it also acknowledges that the MTP may independently serve as a prima facie showing of land status:

> Thus, it appears that on February 2, 1967, the plat showed prima facie that the lands in issue were embraced in the state selection application. It is true that the historical index shows a homestead entry affecting the lands in issue, but further

> reference to the serial register sheet of the state selection application, whose number was shown on the plat, would have demonstrated the appropriation of the land.
>
> Either on the basis of the prima facie appropriation of the land shown by the plat or on the basis of the plat, historical index, and serial register sheet of the state selection applications, the land office records reflected the appropriation of the lands in issue.

6 IBLA at 69-70, 79 I.D. at 396. In Thomas, supra, the Board again observed that noting a State selection application on the MTP amounts to a "prima facie appropriation of the land," quoting Makepeace with approval. 59 IBLA at 366. The Board concluded that "even though the State selection may have been void or voidable, the notation rule itself precluded appropriation of the land until canceled on such records." Id. The Board reaffirmed this proposition in Toohey, 88 IBLA at 86-88, 92 I.D. at 328-30.

It was not error in this case for BLM to invoke the notation rule on the basis of State selections noted on the MTP. While we know by examination of the State selection application files (and BLM's statements concerning these files) that the applications were submitted under the specific authority of section 6(b) of the Statehood Act, and that one of these applications (A-053727) was rejected in part because of its inclusion of national forest lands, these facts are not revealed by entries made on the MTP. The ordinary citizen contemplating a proposed use of the public lands for a valid purpose would quite reasonably look to lands other than those within T. 10 N., R. 2 E., Seward Meridian, upon discerning from the MTP for this township that it was included in State selection applications. Further, there is nothing on the face of the MTP's that would suggest the State

selection entries were invalid or conflicting. The notation rule was meant to apply to such circumstances. Makepeace, supra; Thomas, supra; Toohey, supra.

[4] Although the Makepeace decision indulged in an in pari materia consideration of three land status records, i.e., the MTP, historical index (HI), and serial register sheet for a State selection application, as a further method of determining whether lands were appropriated at a particular time, this was only done because of a conflict noted between the MTP and the HI. The Board has examined copies of the HI for unsurveyed T. 10 N., R. 2 E., Seward Meridian, date-stamped September 4, 1984. For township 10, the HI lists only one of the three State selection applications involved herein, viz., A-053727. The entry reflects that acreage was patented to the State pursuant to this selection application with an "action date" of July 28, 1972. Read in conjunction with the MTP for township 10, it does become evident from the HI that the status of State selection application A-053727 has not been updated on the plat. This isolated record conflict is of no assistance to appellants, however. Since the HI makes no reference to two pending State selection applications which the MTP depicts as affecting the township as a whole, A-058731 (mineral estate only) and A-063695, the presumptive ineligibility of township 10 for other appropriation still holds. 5/ Were it the case that the HI showed all the State

5/ Appellants submit that State selection application A-058731 was filed by the State under authority of section 4 of the Act of Sept. 14, 1960, 74 Stat. 1024, whereby the State may select the retained mineral rights of the United States in "lands which have been disposed of." Citing to a BLM State Office decision dated June 21, 1966, appellants contend that the State cannot select land for the reserved mineral interest of the United States until "issuance of a patent with reservation to the United States" (SOR at 9), and that the Chugach National Forest lands where appellants' mining claims lie, do not satisfy this definition of "disposed of" lands. Id.

selection applications recorded on the MTP to be adjudicated (which they were not), it would be reasonable to consider whether, under such circumstances, BLM misapplied the notation rule in this case. 6/

Nor do the serial register sheets for the subject State selection applications, standing alone or in conjunction with the records discussed above, pose a basis for appellants to have surmised that any of the land within township 10 could be appropriated for mining. 7/ For State selection application

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fn. 5 (continued)

It is not inconceivable that some of the lands within the Chugach National Forest could have lawfully been "disposed of" by the United States with a retained mineral interest, but is not clear from the record whether or to what extent this has occurred. We do note that mineral estate selection application A-058731 is denominated as a section 6(b) and 6(h) submission under the Statehood Act, although the language quoted from section 4 of the Act of Sept. 14, 1960, supra, was included by Congress as an amendment to section 6 of the Statehood Act (governing grants for community purposes). It is further noted from the final entry on the serial register sheet for this application that on Nov. 2, 1977, State selection A-058731 was "held for rejection in part," with no further details provided.

In light of the confusion that surrounds this application, the Board is not inclined to rule whether or not this selection stands as a bar to appellants' placer mining claims. Under a notation rule analysis, however, we do not have to. Regardless of whether the selection was void or voidable, its entry on the MTP segregated the mineral estate for all eligible lands within township 10 from other appropriations.

6/ Judge Burski's concurring opinion in Toohey states that where there is a conflict in official land status records, the notation rule cannot be invoked. 88 IBLA 101, 92 I.D. 337. This was not an issue in Toohey, as the concurring opinion acknowledges, inasmuch as the records entitled to official notice for land status purposes did not contradict the segregative effect of the State selection applications as noted on the MTP's.

7/ Serial register sheets were not included by Judge Burski in his separate opinion in Toohey as one of the "records of the Department for the purposes of determining the ambit and scope of the notation rule." The Board accepts limiting the scope of such records to the MTP, HI and other use plats, as Judge Burski propounds in Toohey, 88 IBLA at 101, 92 I.D. 338. The serial register was created on July 1, 1908, as a digest of each case record for all public land transactions except withdrawals. Beginning in 1953, applications for withdrawals were also given a serial number. The Public Land Records--Footnotes to American History, BLM, 1959. As with individual case files to which they pertain, serial registers "do not purport to establish the status

A-053727, none of the entries found on the serial register sheets reveals that BLM rejected this application, in part, to the extent it included Chugach National Forest lands. Though this apparently occurred through BLM decision dated August 2, 1966 (see note 4), the entry beside this date on the register merely reads: "Tentative approval given to 18.43 acres." In any event, the serial register goes on to note that on June 16, 1972, selection application A-053727 was amended to include all of T. 10 N., R. 2 E., Seward Meridian, except patented lands. This is followed by an entry dated August 23, 1972, noting that patent 50-73-0028 was issued July 28, 1972, for an area aggregating 7,911.11 acres. Even assuming that the foregoing register notations unequivocally signified that State selection application A-053727 did not operate as a bar to mining claim entries as of March 1981, when appellants' location notices were filed, the record still shows two other State selection applications affecting township 10, to wit: A-058731 (for mineral estate only) and A-063695. As already noted, the precise nature and status of State selection application A-058731 is in some doubt (see note 5). Assuming, in the light most favorable to appellants, that as a matter of fact and law Chugach National Forest lands could not have been segregated from mineral entry by virtue of this mineral estate selection, such lands (surface and mineral) were nevertheless clearly segregated by virtue of State selection application A-063695. Unlike the other two State selection applications for township 10, A-063695 has been neither partially nor wholly adjudicated; it remains an open application as far as all public land records furnished the Board are concerned. The only challenge appellants make to

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fn. 7 (continued)
of the land." 88 IBLA at 104, 92 I.D. 339. Serial register information is discussed here because of the attention its received in Toohey and Makepeace.

this selection is the general charge that it "manifests all of the same limitations of the Section 6(b) selections noted above" and that "national forest lands were not 'open' to State selection by virtue of the type of application filed" (SOR at 7, 8). This general challenge has already been discussed. It does not dispense with application of the notation rule to bar appellants' claims.

The Board's finding and conclusions regarding the effect of the State selection applications noted on the MTP for T. 10 N., R. 2 E., Seward Meridian, at the time appellants' mining claim location notices were filed may be summarized as follows. The fact that state selection applications A-053727, A-058731, A-063695, were recorded on the MTP in question resulted in prima facie evidence that all lands denominated as selected were thereby segregated from subsequent appropriation. This prima facie segregative effect occurred even if the State selections were void or voidable. Consideration of other land status records in conjunction with the MTP fails to establish that Chugach National Forest lands were excluded from any of the above State selections or that such selections were rejected in part to the extent national forest lands were included in the applications. Though from the evidence presented in this case and in Toohey, it is known that Chugach National Forest lands were excluded from State selection application A-053727 in agency adjudication of this selection, this action was not reflected on the MTP or otherwise publicly disseminated. Even if the foregoing partial rejection had been duly noted on the MTP, two other State selection applications, A-058731 and A-063695, remain pending and their pendency independently bars conflicting appropriations of the same land (here, all of township 10).

Forest Service Withdrawal

[5] We turn to the effect of Forest Service withdrawal application AA-23139, filed after enactment of FLPMA, 43 U.S.C. §§ 1701-1784 (1982). As noted in Toohey, AA-23139 is governed by distinct statutory and regulatory provisions that distinguish it from State selection applications previously discussed, as well as from withdrawals predating enactment of FLPMA. Section 204 of FLPMA (43 U.S.C. § 1714 (1982)), provides:

> (a) Authorization and limitation; delegation of authority
>
> On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section * * *.
>
> (b) Application and procedures applicable subsequent to submission of application
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> (1) Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice. [Emphasis added.]

Apparent from the above is that Congress has mandated a specific time when the segregative effect of withdrawal applications filed after enactment of FLPMA shall terminate by operation of law. Pertinent to this case, that would be 2 years from the date of the Federal Register notice regarding the

filing of Forest Service withdrawal application AA-23139. The required Federal Register notice for this withdrawal application was published December 5, 1978, at 43 FR 57134-37. Hence, in the absence of rejection or approval of the application, its segregative effect automatically terminated on December 5, 1980. 8/ The Departmental regulations which implement the withdrawal provisions of section 204 of FLPMA are found at 43 CFR Part 2300. 9/

Against this backdrop, appellants contend that the Department is in violation of the will of Congress in permitting a continuing MTP notation of Forest Service withdrawal application AA-23139 to preclude other appropriation of the public lands subsequent to December 5, 1980, the date the segregative effect of AA-23139 terminated by statute. We agree. While we have held that the notation rule represents a valid administrative device for managing the status and disposition of public lands, we have also noted that the Department can abolish it by rule whenever it desires. Toohey, supra, 88 IBLA at 96, 92 I.D. at 334-35. So, too, of course, may Congress, and it has done this by, inter alia, precluding any segregative effect to withdrawal

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8/ The Dec. 5, 1978, Federal Register notice properly advised:

"For a period of 2 years from the date of publication of this notice in the Federal Register, the above described lands will be segregated from location, selection, and entry to the extent that the withdrawal applied for, if effected, would prevent such forms of disposal, unless the application is rejected or the withdrawal is approved prior to that date. If the withdrawal is approved, it will be for a period of 2 years, unless duly extended."

9/ At 43 CFR 2310.2(a), it is provided in relevant part:

"Publication of the notice [of application for withdrawal] in the Federal Register shall segregate the lands described in the application or proposal from settlement, sale, location or entry under the public land laws, including the mining laws, to the extent specified in the notice, for 2 years from the date of publication of the notice unless the segregative effect is terminated sooner in accordance with the provisions of this part."

applications filed after October 21, 1976, after 2 years from the date such applications are noted in the Federal Register. It was therefore error for BLM to extend application of the notation rule to Forest Service withdrawal application AA-23139 as grounds for rejecting appellants' mining claim locations filed in 1981.

CIRI Selection

[6] The distinguishing feature between this case and Toohey is that the mining claims of Cavanagh and McCarthy were also rejected on grounds that they were filed for location in March 1981 at a time when the MTP for T. 10 N., R. 3. E, Seward Meridian, in which some of their claims were located, showed all available lands within this township to be encompassed by a land selection of Cook Inlet Region, Inc., filed under authority of section 12 of ANCSA, 43 U.S.C. § 1611. 10/ Though this regional corporation selection application had been relinquished by CIRI on February 13, 1981, BLM held that because the relinquishment was not noted on the MTP until April 22, 1982, the segregative effect arising from notation of the application on the MTP continued until notation of the relinquishment.

This is the first case in which the Board has been called upon to determine the application of the notation rule to regional corporation selections. We are constrained to hold the notation rule cannot be invoked

10/ Section 12 of ANCSA authorizes land selections by regional corporations at subsections (a)(1) and (c)(3). The regulations of the Department implementing these type selections are found at 43 CFR Part 2650, Subpart 2652. CIRI selection application AA-8098-36 specifies at paragraph 2 that the selection is filed under authority of 43 CFR Subpart 2652.

on the basis of regional corporation selection applications filed under authority of secion 12 of ANCSA and 43 CFR Subpart 2652.

Unlike the regulations governing State selection applications (43 CFR 2091-6-4; 43 CFR 2627.4(b)); withdrawal applications (43 CFR 2310.2); Native village selection applications under ANCSA (43 CFR 2651.2(a)(7)), or miscellaneous selections under ANCSA (43 CFR Subpart 2653, including regional corporation selections filed under the authority of section 14(h) of the Act), the regulations governing regional corporation selections under section 12 of ANCSA (43 CFR Part 2650, Subpart 2652) do not attribute a segregative effect to the filing of such an application. Nor does the Act. See 43 U.S.C. § 1611(a)(1) and (c)(3) (1982).

The very reason that the notation rule has been invoked in prior cases to perpetuate the segregative effect of State selection applications or other appropriations of the public domain even after particular applications have been rejected is that the public is presumed to know that certain kinds of applications trigger a segregative effect upon filing. Where the knowledge of law imputed to the public is that no segregative effect attaches, as is presently the case with section 12 regional corporation selections, the notation of such an application on the land status records cannot logically deter subsequent attempted appropriations for purposes authorized by law. Accordingly, this case must be remanded to BLM for readjudication of appellants' mining claims that were declared null and void ab initio due to the notation of the CIRI application.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part as modified and reversed in part. This matter is remanded for readjudication of appellants' mining claims located in T. 10 N., R. 3 E., Seward Meridian.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the result reached in the majority analysis, I wish to address in greater detail two aspects of the majority decision. The first of these relates to the relevancy of the serial register pages to the application of the notation rule.

In its analysis, the majority accepts the premise that a conflict of notations on the status records vitiates reliance on the notation rule as an independent bar to an appropriation. For reasons expressed in B. J. Toohey, 88 IBLA 66, 98-105, 92 I.D. 317, 336-40 (1985), I agree. The majority also, however, rejects recourse to the serial register pages in ascertaining whether or not the status records conflict. While I think the majority has reached the correct result, I believe further analysis may be warranted.

The serial register system was initiated at the direction of Secretary Garfield on June 1, 1908. See 37 L.D. 45 (1908). Prior to that time, each land office used various series of numbers for declarations, applications, entries, purchases, selections, etc. The serial register system was designed to effect a unified system in which each declaration, application, or other initial paper would be assigned a specific number at the time and in the order in which it was presented, which number would then be used to identify all other filings made and actions undertaken which affected the original filing.

Clearly, the purpose of the system was to provide a uniform system of maintaining the case records of the land offices. Thus, the serial register pages were not part of the land status records employed in the land offices,

but rather were part of the case record system. Indeed, this is made completely clear by Instructions approved by Secretary Ballinger in 1910. These Instructions, printed at 38 L.D. 575, were designed to prevent general public access to the serial register pages. This limitation on public access was justified by the assertion that "in almost every instance, the status of any tract of land may be obtained by reference to the plat and tract book." Id.

It could scarcely be contended that the public was properly chargeable with the knowledge to be found in the serial register pages when the public was effectively denied access to those records. And, of course, the public never was chargeable, since case files were not themselves part of the land status records for purposes of the notation rule. See B. J. Toohey, supra. While this Instruction was ultimately revoked, see 41 L.D. 358 (1912), the revocation was not predicated on any view that the serial register pages were land status records but rather was premised on the simple fact that they were public records which should not normally be withheld from public scrutiny. Neither case records nor serial register pages have ever served as status records for the purpose of the notation rule, any inference to the contrary that might be gleaned from this Board's decision in State of Alaska, Kenneth D. Makepeace, 6 IBLA 58, 79 I.D. 391 (1972), notwithstanding. For these reasons, I think the majority is obviously correct in its holding that serial register pages are not part of the land status records for purposes of ascertaining the applicability of the notation rule.

The second issue which I wish to more fully explore is the question whether an application filed by a regional corporation under either section

12(a)(1) or 12(c) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611(a)(1) and (c) (1982), segregates the land. BLM suggests that there is such a segregative effect but fails to point to a regulation that so provides. Its reference to 43 CFR 2091.1(b) is inapposite as that regulation merely directs rejection of discretionary applications and does not independently establish whether or not a "selection of record" effects a segregation of land so selected. That all "selections of record" do not have such an effect can be seen by the recent amendment of 43 CFR 2091.2-6, which was adopted on June 28, 1981, 46 FR 38508. Under this amendment, the filing of a state indemnity or lieu selection does segregate the land. However, this regulation was adopted precisely because the mere filing of an indemnity or lieu selection did not segregate the land under prior regulations which were in effect, including 43 CFR 2091.1.

Counsel for BLM adverts to a legal memorandum sent from the Office of the Regional Solicitor to the Alaska State Director as support for its contention that the selection of Cook Inlet Region, Inc. (CIRI), effected a segregation of the land sought. It is unnecessary to examine whether or not that memorandum correctly analyzed the legal considerations which it explored because it was directed solely to considering whether regional corporation selections under section 14(h)(8) of ANSCA, 43 U.S.C. § 1613(h)(8), segregated the land selected. The question which was examined in the memorandum was somewhat complicated by the fact that while the specific regulations relating to section 14(h)(8) selections expressly provided that the application would segregate the land from further appropriation (see 43 CFR 2653.2(d)), the statute permitted selection of land under section 14(h)(8)

only where the land had been withdrawn under section 11 or 16 of ANCSA, 43 U.S.C. §§ 1610 and 1615 (1982). Thus, the precise question examined was whether a segregation could be effected by an application under 14(h)(8) where the land sought had not been withdrawn as required by the statute.

By way of contrast, in this case there is no regulation which provides for the segregation of lands sought by a regional corporation under section 12(a)(1) and 12(c). Indeed, BLM directly eschews any argument that 43 CFR 2653.2(d) is applicable to these selections, noting that "BLM views that regulation as specifically addressing only those selections made pursuant to section 14(h) of ANCSA, 43 U.S.C. § 1613(h)." BLM Answer at 5. Nor is there any theory by which, in the absence of a substantive regulation providing that a specific application or selection segregates the land, the mere notation of such an application can result in a segregation. As the majority succinctly notes "[w]here the knowledge of law imputed to the public is that no segregative effect attaches, as is presently the case with section 12 regional corporation selections, the notation of such an application on the land status records cannot logically deter subsequent attempted appropriations for purposes authorized by law." Supra at ___. In the absence of a substantive regulation providing that the notation of a regional corporation selection under section 12(a)(1) or 12(c) segregates the land, the mere notation of such a pending selection is incapable of independently creating such a segregation. The majority decision correctly rejects the argument advanced by BLM with respect to the CIRI selection notation.

I recognize that an argument could be made that it is generally impossible to establish from the status records whether a regional selection is

made under sections 12(a)(1), 12(c), or 14(h) of ANCSA. This being the case, how would the notation rule apply where the status records merely showed that a regional selection had been made? Would it be presumed to be under section 12(a)(1) or 12(c) such that no segregation could be imputed or under section 14(h) with the result that a segregation would be assumed?

In candor, this question appears to be unique in the history of the application of the notation rule. The reason for this is simply that, in the past, a specific application either did or did not have a segregative effect. To my knowledge, the regulations promulgated for regional selections are the first that have ever treated some selections as segregating the land and others of the same type as not resulting in a segregation. The problem that arises is that in the absence of a notation on the status entries relating to the statutory basis for the regional selection it becomes impossible to determine whether or not the selection segregates the land from subsequent appropriation. In my view, the notation rule simply cannot apply in such circumstances.

I have already noted my agreement with the majority that a conflict in notations removes the basis for the application of the notation rule, which is that the public has a right to rely on the status records of the Department, even when they are erroneous. Thus, when the records conflict, the notation rule cannot operate to independently foreclose an appropriation not substantively foreclosed, since the factual premise of the rule, viz., that the records put people on clear notice, cannot be shown to exist. Similarly, with respect to regional selections, where the status records fail to note

the statutory basis of the selection there is no reason to impute knowledge to all subsequent appropriators that the application segregates since it may or may not. Thus, I would hold that absent identification of the statutory basis for the regional selection on the status records, there is no basis for invoking the notation rule.

It may be that the application was, in fact, made under section 14(h) of ANCSA. In such a case, the land might well be deemed not to be available, but this would result from the substantive segregation effected by 43 CFR 2653.2(d), not the notation rule. An individual who proceeds to initiate an appropriation of land in the face of conflicting notations runs the risk that the attempted appropriation may be defeated if, in fact, the land is actually withdrawn or segregated. So, too, an individual who attempts to initiate rights in lands embraced in a regional selection faces the prospect that, should it be ultimately determined the land was sought under section 14(h) of ANCSA and that such applications do, indeed, segregate the land, all of his efforts will avail him nothing. But it is the actual segregation effected by the selection which will defeat him and not its notation on the status records.

Therefore, for the reasons expressed by the majority, as further explicated herein, I fully concur with the disposition of the instant appeal by the majority.

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James L. Burski
Administrative Judge